In the High Court of Uttaranchal, at

Nainital.

Second Appeal No. 1098/2001

(Old No. 1590/1982

1- Smt. Basanti Devi widow of Dharam Singh
(Since deceased).
2- Km. Saraswati Devi alias Saraswati Bhora
D/o Basanti Devi,
R/o of Village Takana, Patti Mahar,
Tehsil and District
Pithoragarh ..Plaintiffs-Appellants.

Vs.

1- Mahendra Singh S/o Jasaudh Singh
R/o Village Nayal, at present Village
Takana, District Pithoragarh.
2- Indra Deo S/o Lalmani
R/o Village takana,
District Pithoragarh ...Defendant-respondents.

Sri K.N. Joshi, learned counsel for the appellants.
Sri Rajendra Dobhal, learned counsel for the respondents.

Hon'ble B.C. Kandpal, J.

This Second Appeal, U/S 100 C.P.C., has been preferred against the judgment and order dated 12th February, 1982, in Civil Appeal No. 4 of 1979, passed by the then District Judge, Pithoragarh, arising out of the judgment and decree passed by the then Munsif, Pithoragarh, in Civil Suit No. 4 of 1968, dismissing the appeal and confirming the judgment and decree of the trial court.

2- Brief facts giving rise to this appeal are that Smt. Basanti Devi (since deceased) and her daughter

Saraswati are the owners of plot No. 438 (old No. 5787) situated in village Kumaur in Takana, Patti Mahar, District Pithoragarh. The plaintiff/appellants started construction of the house in the aforesaid plot in the month of July 1966 and completed the construction of the four rooms in October 1966. As per the plaint allegations, the defendant/respondent No.1, Mahendra Singh, cousin of Heera Singh Dharamputra of plaintiff No.1, began to live with the plaintiffs house in May 1965. When the plaintiffs stated construction work of the house, defendant No. 1 used to look-after the construction work, as the plaintiff was an old illiterate lady. After completion of the house, the plaintiffs used to reside in the western room in the first storey, whereas the defendant No.1 with the permission of the plaintiffs kept his tools, contract materials etc in the rest three rooms of the house, till the construction of the house was completed. Later on the defendant No.1 started quarrelling with the plaintiffs and started criminal proceedings. Thereupon, on 22-2-1967, the plaintiffs gave a registered notice to defendant No.1 terminating his licence in respect of the three rooms of the house, but instead of vacating the house, he handed over possession of those rooms to defendant No.2 on 20-4-1967 without the consent of the plaintiffs. Hence on 4.5.1967 registered notice was also given to defendant No.2 but with no result. Therefore, the plaintiffs/appellants filed suit before the Munsif, Pithoragarh, for ejectment and claimed Rs. 500/- as damages for use and occupation from 20-4-1967 to 20-9-1967. Subsequently, by consent of the parties, the valuation of the suit was fixed at Rs. 9,000/-.

4- The defendants filed their written statements. The defendant no.1 pleaded in his W.S. that the plaintiffs had promised to sell the site of the house to him for Rs. 800/-. It was also alleged that in pursuance of that agreement defendant no.1 got a 4 Tola gold necklace (Guloband) prepared and handed it over to plaintiff No.1 and also paid Rs. 6000/- to her. Thereafter the defendant No.1 constructed the house in dispute after spending Rs. 12,000/-. Therefore the defendant No.1 claimed that he was owner in possession of the house.

5- The defendant no.2 Indra Dev has pleaded in his W.S. that he was a tenant of the two rooms of the house in dispute on behalf of defendant No.1 on a monthly rent of Rs. 50/- and he paid rent to defendant No.1.

6- On the basis of pleadings of parties, the trial Court framed relevant issues in the suit. Thereafter parties adduced evidence. The trial court, on assessment of evidence of the parties, came to the conclusion that the defendant No.1 with the consent of plaintiffs had constructed the disputed portion of the house over their land and held that the plaintiffs can not seek his ejectment from the house. It was also concluded that the suit was barred by the principle of estoppel. Accordingly the trial court dismissed the suit of the plaintiffs/appellants.

7- Feeling aggrieved by the dismissal of the civil suit, plaintiffs preferred an appeal before the District Judge, Pithoragarh. The First Appellate Court also dismissed the appeal vide its judgment and order dated 12-2-1982.

8- Now the plaintiffs/appellants have come up in appeal before this Court.

9- I have heard learned counsel for the parties and perused the record.

10- The record reveals that the lower appellate court while deciding the appeal, felt that issue No.1 relating to the point- "as to whether the plaintiffs/appellants were the owners of the property in suit" was left undecided by the trial court, therefore the appellate court with the consent of the parties examined the plaintiff Smt. Basanti Devi as a witness as well as Keshav Dutt Pandey, Tax Collector, Nagar Palika as a defendant/respondent's witness. The appellate court, thereafter decided the appeal after determining the following points:-

1- Whether the defendant No.1 had kept his Theka materials and tools, etc. in the disputed portion of the house in question with the permission of the plaintiffs till the completion of the construction?.
2- Whether the plaintiffs had got the disputed portion of the house constructed with their funds?.
3- Whether the plaintiffs had agreed to sell the site of the disputed portion of the house in dispute to defendant no.1 and had accepted Rs. 800/- in the shape of Guloband (gold necklace)?. If not, its effect?.

11- The appellate court decided all these points in negative and thereafter dismissed the appeal.

12- This court at the time of admission framed the following substantial question of law:-

> "Whether on facts proved in the case the status of the respondents is that of mere licenses?"

13- The finding of the courts below on the factual aspects are very specific. The evidence reveal that P.W.1, Sarswati Devi has stated that in November, 1966 the defendant/respondent used to keep his Theka materials in the disputed three rooms and that she permitted him to keep the articles in the rooms. P.W.2, Gyanendra Singh, another witness of the plaintiffs/appellants has nowhere stated about the alleged licence. Smt. Basanti Devi plaintiff/appellant entered in the witness box in appellate court, but she has also not stated even a single word regarding the alleged licence, rather in her cross-examination she has stated that when defendant No.1 came to live with her, he had taken a Theka for construction of a Power House. She has further deposed that whenever building materials were left with defendant No.1 in connection with that Theka, he did not keep the same in her house. At the same time she also deposed that she does not know as to where the defendant had kept those building materials. Therefore, there is a material contradiction in the testimony of these two witnesses produced by the plaintiffs/appellants before the courts below. Thus, it is quite clear from the evidence on record that the defendant/respondents with the consent of the plaintiffs/appellants had constructed the disputed portion of the house over the land and under such circumstances the plaintiffs/appellants cannot seek ejectment of the defendant/respondents from the disputed portion of the house.

14- As far as the other points for consideration before the lower appellate court are concerned, the lower appellate court has decided those factual aspects in detail and on the basis of the evidence on record, the lower appellate court came to the conclusion that the plaintiff/appellants miserably failed to establish their case.

15- Both the courts below have recorded the concurrent finding of fact, which howsoever erroneous be, cannot be interfered with in the second appeal. The substantial question of law formulated by this court at the time of admitting the appeal is answered in the negative. I have assessed the findings available on the record into close quarters with the reasoning assigned by the courts below and I am of the view that the courts below have recorded the findings after sound assessment of the evidence on all factual aspects.

16- The appeal, thus, fails and is liable to be dismissed.

17- Accordingly the second appeal is dismissed.

(B.C. Kandpal, J.)

Dated: September 6th, 2006.
ISB